

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: February 7, 2019; Ruling No. 2019-4851; Agency: Department of Corrections; Outcome: Grievant Not in Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution**

**COMPLIANCE RULING**

In the matter of the Department of Corrections  
Ruling Number 2019-4851  
February 7, 2019

The Department of Corrections (the “agency”) has requested a compliance ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management in relation to the grievant’s grievance dated November 13, 2016. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding his grievance.

FACTS

On or about November 18, 2016, the grievant initiated an expedited grievance.<sup>1</sup> The second step response was sent to the grievant by certified mail on December 22, 2016. Having received no further response from the grievant indicating whether he wished to advance or conclude the grievance, the agency states that it sent a notice of noncompliance to him on January 9, 2017.<sup>2</sup> The grievant has apparently not responded since. Based on the grievant’s alleged noncompliance with the grievance procedure, the agency seeks a compliance ruling allowing it to administratively close the grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>3</sup> That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without EEDR’s involvement. Specifically, the party claiming noncompliance must notify the other party

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<sup>1</sup> EEDR received the grievance directly from the grievant on November 18, 2016, and advised the grievant that he must initiate the grievance directly with the agency. In general, a grievance initiated in a timely manner but with the wrong management representative is not barred for noncompliance. *See, e.g.*, EDR Ruling No. 2004-892; EDR Ruling No. 2004-645. EEDR is the essentially equivalent to the “wrong management representative” in such a case. Although the date of initiation has no bearing on this case, the agency appears to have received the grievance on November 30, 2016.

<sup>2</sup> For purposes of this ruling, EEDR will assume the grievant received the agency’s notice of noncompliance because there is nothing to indicate that it may have been sent to an incorrect address or was otherwise improperly addressed. *E.g.*, *Washington v. Anderson*, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988) (holding that the mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of the correspondence by the addressee).

<sup>3</sup> *Grievance Procedure Manual* § 6.3.

in writing and allow five workdays for the opposing party to correct any noncompliance.<sup>4</sup> If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EEDR, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EEDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EEDR's order.<sup>5</sup>

In this case, the grievant appears to have failed to advance or conclude his grievance within five workdays of receiving the agency's second resolution step response, as required by the grievance procedure.<sup>6</sup> Moreover, the agency notified the grievant of his noncompliance and he has not advanced or concluded his grievance.

As the grievant has apparently failed to advance or conclude his grievance in a timely manner, he has failed to comply with the grievance procedure. EEDR therefore orders the grievant to correct his noncompliance **within ten workdays of the date of this ruling** by notifying his human resources office in writing that he wishes either to conclude the grievance or request qualification for a hearing from the agency head. If he does not, the agency may administratively close the grievance without any further action on its part. The grievance may be reopened only upon a timely showing by the grievant of just cause for the delay (for example, a serious illness, or other circumstances beyond the grievant's control).

EEDR's rulings on matters of compliance are final and nonappealable.<sup>7</sup>



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<sup>4</sup> See *id.*

<sup>5</sup> While in cases of substantial noncompliance with procedural rules the grievance statutes grant EEDR the authority to render a decision on a qualifiable issue against a noncompliant party, EEDR favors having grievances decided on the merits rather than procedural violations. Thus, EEDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EEDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

<sup>6</sup> See *Grievance Procedure Manual* § 3.2.

<sup>7</sup> See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).